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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/736,037	12/15/2003	Carrie Melinda Kincaid	1410-77005	4023

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FITCH EVEN TABIN & FLANNERY  
120 S. LASALLE STREET  
SUITE 1600  
CHICAGO, IL 60603-3406

EXAMINER
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PADEN, CAROLYN A

ART UNIT	PAPER NUMBER
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1794

MAIL DATE	DELIVERY MODE
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10/25/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/736,037	<b>Applicant(s)</b> KINCAID ET AL.	
	<b>Examiner</b> Carolyn A. Paden	<b>Art Unit</b> 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 11 September 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1-9, 11-23 and 25-33 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-9, 11-23, 25-33 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on September 11, 2007 has been entered.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 4-9, 11, 14-18, 21 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bower (3,366,494) for reasons of record as further evidenced by Joslyn.

Bower discloses pressurized aerosol food emulsions. In example 1, fruit whip is made to contain water, microcrystalline cellulose, oil, emulsifier and fruit puree. In this case, microcrystalline cellulose and raspberry puree are both considered as sources of dietary fiber. The product was placed in a standard aerosol can with a propellant. The product was considered to

be stable for a long period of time. The emulsifier used in the product is shown in example 1 and also at column 2, lines 32-44. The claims appear to differ from Bower in the recitation of the amount of fiber that is in the product. But to modify the extent of fiber in the Bower product would have been an obvious way to enhance the nutritive quality of fiber in a snack food. Claims 5, 6 and 18 appear to differ from Bower in the recitation of the particular emulsifier used in the composition. Column 2, lines 32-44 offers a variety of emulsifiers that may be used in the product. Diacetyl tartaric acid esters of monoglycerides are well known in the art to be emulsifiers for use in foods. It would have been obvious to use one of a variety of known emulsifiers in the product of Bower. Claims 1 and 11 appear to differ from Bower in the recitation of the density of the product. The density of a product is a physical property that is inherent to the composition. Although Bower does not measure the density of his product, one of ordinary skill in the art would expect the composition Bower to have the density of the claims. Joslyn is cited for further evidenced of the density of foods. At the top of page 202, line 5 relative density and specific gravity are defined as equivalent terms. In the middle of page 202 the density of water is described as being at about 1.0. At the bottom of page 202, last

paragraph, specific gravity is described as being a measure of the concentration of soluble solids in syrups, brines, fruit juices and beverages. At page 204, in figure 11, the specific gravity of sucrose, tomato juice and salt is shown at varying concentrations. With the evidence of Joslyn at figure 11, one of ordinary skill in the art would expect the density or specific gravity of the raspberry puree composition of Bowers to have the density of the claims because of the extent of water, sugar and solids in the composition. Claims 15-17 and 25 are directed to the physical properties of the spread, such as the stability and pressure in the container. No unobvious or unexpected difference is seen from the container composition of Bowers and that of the claims because the Bowers product properties would have been expected in the completed product.

Applicant argues that Bower is a foam, but the foam of Bower could also function as a spread. Applicant argues that the density of a spread is different from that of a foam. But no unobvious result is seen from the difference between the density of the Bower product and the density of the claimed product. The packaged product of Bower is not disclosed as a foam. Applicant argues fluidity and viscosity but the claims do not set forth

these features. No difference is seen between the fluidity and viscosity of Bowers with compared to the claims.

Applicant argues that the microcrystalline cellulose in Bower is used as an emulsifier. But it is well known in the art that food ingredients can have dual functions. Applicant argues that the raspberry puree would add too much fiber to the product. This has been considered but is not persuasive because the raspberry puree would be expected to have water in it as well as fiber. Applicant argues that his fruit composition is different that Bowers fruit composition. This has been considered but the difference is not seen to be unobvious. Then applicant argues that the fiber content of Bowers is too low. But to modify the extent of fiber in Bower would have been an obvious way to enhance the nutritive quality of the product. Applicant urges that the products are different from applicants' invention, but the claims are rejected as being obvious over Bower and not identical to it. Applicant urges that there is no incentive to modify Bower. But Bower provides a selection of different modified edible examples, which encourage product modification.

Claims 2, 3, 9, 12, 13, 19, 20, 22 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bowers as further evidenced by Joslyn as applied to claims 1, 4-8, 11, 14-18, 21 and 25 above, and further in view of Musser (2,883,286).

The claims appear to differ from Bowers in the recitation of the use of chocolate and dairy ingredients in the spread. Musser teaches that it is very well known in the art to incorporate cocoa, chocolate, sugar and milk into aerosol topping formulations. It would have been obvious to incorporate chocolate and dairy ingredients into the fruit whip of Bowers to provide a chocolate impact to the fruit whip.

It is finally appreciated that peanut butter is not mentioned. Peanut butter, like chocolate, is a well-known snack and dessert food. Given the variety of toppings set forth in Bowers in view of Musser, it would have been obvious to one of ordinary skill in the art to incorporate peanut butter into the fruit whip of Bowers. This would provide a new peanut butter and jelly flavor to the fruit whip.

Applicant argues that it would not be obvious to include chocolate in the Bower formulation. But Bower, at column 5, lines 60-67, as further evidenced by Joslyn, contemplates a variety of additional foods of varying

formulations and densities. Applicant argues that chocolate would not be expected to form the emulsion of Bower. This has been considered but is not persuasive because chocolate is a minor ingredient and water or milk are major ingredients in the product of Musser.

Claims 26-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bowers as further evidenced by Joslyn in view of Musser as applied to claims 1-9, 11-23 and 25 above, and further in view of Food Engineering article.

The claims appear to differ from Bowers in view of Musser in the recitation of the use of the particular container used in the product. Food Engineering teaches that aerosol containers with floating plungers are known in the art. This article also draws equivalence between the two aerosol and piston type filling containers. No unobvious or unexpected result is seen from the use of one pressurized can or the other.

Applicant argues that Food Engineering does not provide the details of the container. It is appreciated that a "floating plunger" is not mentioned. The container system relies on pressurized gas injected below the piston head. There would be no technical reason to attach the plunger to any part of the container because the plunger is maintained in place by gas



pressure. So one of ordinary skill in the art would expect the plunger to be a floating plunger. Applicant urges that there would be no reason to include the foods of Bower or Musser in the container of Food Engineering. This has been considered but is not persuasive because Food Engineering provides an economic reason to modify the container construction, which is that the container assisted in improving product sales.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks, can be reached on (571) 272-1401 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR

system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



CAROLYN PADEN  
PRIMARY EXAMINER  
GROUP 1900

10-24-07

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